

MAY 1 1920

JAMES D. NAHER,
CLERK.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 370.

J. HARTLEY MANNERS,

Petitioner,

v.

OLIVER MOROSCO,

Respondent.

MOTION AS TO FORM OF DECREE AND
MEMORANDUM ON MOTION.

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.



IN THE
Supreme Court of the United States.

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J. HARTLEY MANNERS,
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v.

OLIVER MOROSCO.

No. 370.

CHARLES H. TUTTLE, Esq.,
WILLIAM KLEIN, Esq.,
NATHAN BURKAN, Esq.,

GENTLEMEN :—

PLEASE TAKE NOTICE that on Monday next, May 3rd, or as soon thereafter as counsel can be heard, the undersigned will submit to the Supreme Court of the United States a motion to modify the decree in the above entitled case, copies of which are handed you herewith.

Please acknowledge receipt.

Respectfully,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES,
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Petitioner,

v.

OLIVER MOROSCO,
Respondent.

No. 370.

MOTION AS TO FORM OF DECREE.

Comes now the petitioner in the above entitled case, and suggests to the court that there be entered therein a form of decree to carry into effect the opinion of the court handed down on March 22nd, substantially as follows:

Decree reversed. Injunction to issue on condition that the plaintiff shall neither represent nor authorize the representation of the play, "Peg O' My Heart" in moving pictures, while the contract with defendant remains in force, in any city, town, or place, during the period the play is being produced therein, in the United States or Canada, on compliance with the terms of his contract by defendant.

Or, that the case be remanded to the District Court for further proceedings, not inconsistent with the opinion of this court, to protect the parties to the cause in their rights; petitioner in his right to use the play in moving pictures and respondent in his right to produce it by living actors, in accordance with the terms of their contracts.

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES,
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No. 370.

**MEMORANDUM ON MOTION AS TO FORM
OF DECREE.**

This court, in its opinion herein, after referring to the power in the petitioner "to set up the same play in motion pictures a few doors off, with a much smaller admission fee", directs that the injunction issue "upon the condition that plaintiff shall neither represent nor authorize the representation of the play 'Peg O' My Heart' in moving pictures while the contract with the defendant remains in force".

The play has been performed in every large city in the United States by Morosco, during the past six years, so that a performance in spoken drama, with any hope of profit, can only be given in small cities or towns, or in stock theatres.

By "stock theatre" is meant, as the record shows, a theatre where they use plays after they have been played in New York and the metropolitan cities. They are played at a fixed royalty, and as a rule the author divides the royalties. . . . Stock theatres have a stock company, which company plays a different play, as a rule, each week the company remains at the theatre (Record, p. 72).

A production by Morosco in a town in California, for instance, could not be affected by a motion picture exhibition in New York.

Under the protection of the decree directed to issue, Morosco may continue indefinitely giving performances in small towns seventy-five times during the theatrical season, if only for the purpose of holding up the exercise by the author of his motion picture rights, and coercing an arrangement with him (Morosco) giving him an interest he does not at present possess.

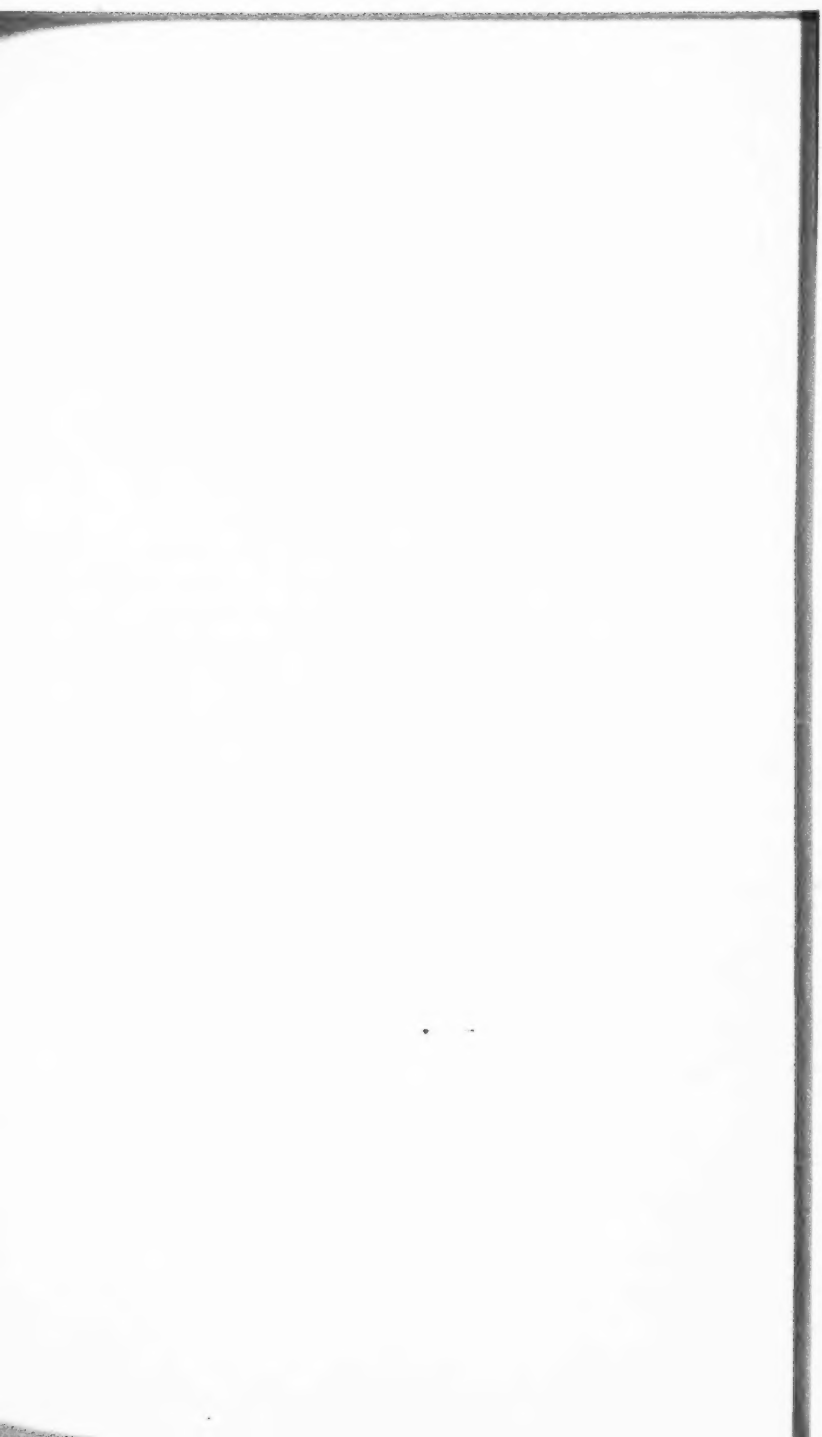
The spirit and intent of the decision of the court, it is submitted, can be carried into effect by a decree, substantially as suggested in the motion, to-wit: *That there be no motion picture exhibition given in any city, town or place, during the period the play is being produced therein by defendant, in the United States or Canada, during the term of the contract and while defendant complies therewith.*

It is further submitted that, if for any reason, it shall seem expedient to frame a decree as above suggested, then the decree below should be reversed with instructions to the District Court for such further proceedings as may be necessary, not inconsistent with the opinion of this court, to protect the parties to the cause in their respective rights, Mannors in his right to use the play in moving pictures, and Morosco the right to produce it under the terms of the contract by living actors.

Petitioner asks that power be not reposed in the respondent to indefinitely and arbitrarily prevent the use of the motion picture rights which the court has decided are the property of petitioner.

Respectfully submitted,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.





Office Supreme Court, U. S.
FILED

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vs.

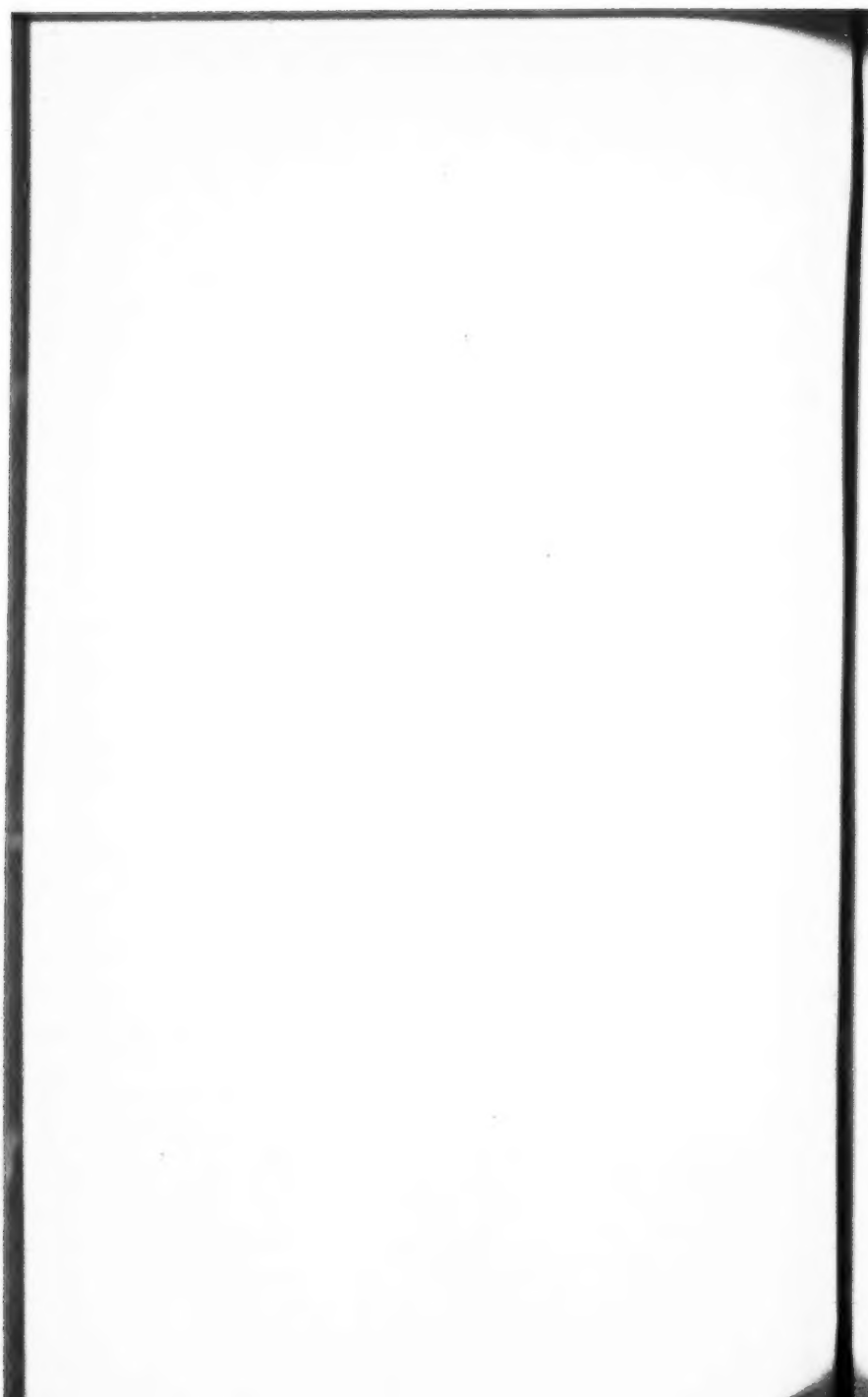
OLIVER MOROSCO

Respondent

MEMORANDUM FOR MOROSCO IN OPPOSITION TO MOTION
AS TO FORM OF DECREE

CHARLES H. TUTTLE
WILLIAM KLEIN

Of Counsel



IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,	}
Petitioner,	
<i>against</i>	
OLIVER MOROSCO,	
Respondent.	}

MEMORANDUM FOR MOROSCO IN OPPOSITION TO MOTION AS TO FORM OF DECREE.

We oppose the motion "to modify the decree in the above entitled case." We do so, because:

I. The existing decree is in the usual form of reversal directing that the decree below be

"reversed with costs and cause remanded for further proceedings in conformity with the opinion of this Court."

The petitioner Manners, therefore, has his full remedy in the Court below, and should not trouble this Court with assertions of contested facts which cannot be solved by reference to the record and involve matters which are either wholly irrelevant or can readily be disposed of in a court of first instance.

II. The motion is designed to deprive Morosco of all practical benefit of the implied negative covenant, which this Court enforced by rendering it a condition of the injunction.

Indeed, it would go further, because the motion, if granted, would destroy altogether the market for the spoken play, and would put Morosco entirely at Manners' mercy.

This bold proposal is nothing less than that this Court should allow Manners, contrary to its opinion, "to infest the country" with motion pictures in every locality except the particular "city, town or place" wherein Morosco might happen then to be producing the play. Manners, in short, seeks to rewrite in his own interest the opinion and decision of this Court.

The Court can readily perceive that the country would be flooded by Manners with motion picture representations of the play, unless he was under some restraint; and that if, while Morosco was producing the spoken play in one town, Manners could cover the rest of the country with motion picture productions, "the market for the spoken play would be greatly impaired, if not destroyed." The play could not profitably be moved to any city, town or place which had already been covered by the motion picture production.

Since Morosco has the now unquestionable right to produce the play in any locality in the United States and Canada, he is entitled through enforcement of the implied negative covenant to have the market for the play throughout the same territory preserved and protected. Manners' proposal would destroy it.

Manners' memorandum states:

"The play has been performed in every large city in the United States by Morosco, during the past six years, so that a performance in spoken drama, with any hope of profit, can only be given in small cities or towns, or in stock theatres."

This is not in any respect the fact. The play has not been produced in every large city in the United States or Canada; and even if it had, the qualities of the play are such that it could return with success. Moreover, stock theatres are all over the United States; and if Manners may "mop up" the United States with motion picture production, Morosco's conceded right and his purpose to have the play produced in these theatres would be nullified.

Manners' memorandum further says:

"A production by Morosco in a town in California, for instance, could not be affected by a motion picture exhibition in New York."

But Morosco's unquestionable right to produce the spoken play in New York and its vicinity would be vastly affected by a previous motion picture exploitation thereof throughout the numerous motion picture theatres in that locality.

Moreover, under the proposal in Manners' present motion, Manners would be permitted to have a prior production in the assumed "town in California" before Morosco attempted to take his play there;—indeed, in every other locality in the United States, thus destroying in advance all possibility for profitably producing, moving or marketing the play or taking any further benefit from the contract between Morosco and Manners.

It is not too much to say that the proposal in Manners' motion is a patent device to neutralize

altogether the enforcement decreed by this Court of the implied negative covenant on Manners' part. It would permit Manners to do just what this Court said he should not do.

This Court quoted with approval from *Harper Bros v. Klaw*, 232 Fed. Rep., 609, as follows (p. 613):

"Admittedly if Harper Bros. (or Klaw and Erlanger, for the matter of that), permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed."

This action of this Court in thus adopting the decision of Judge Hough in *Harper Bros. v. Klaw*, *supra*, renders applicable the decree as entered by Judge Hough in that case. The clause therein in which he enforced the negative covenant reads as follows:

"FURTHER ORDERED, ADJUDGED AND DECREED: That the complainants Harper & Brothers and Henry L. Wallace, and each of them, and their and each of their successors, agents, servants, licensees and employees, and any other person acting under their direction, control or otherwise, be and they are hereby enjoined and restrained during the term of the contract between the complainants and the defendants dated the 11th day of April, 1899, from playing, producing, exhibiting, by means of motion pictures, by themselves or their agents, servants, assignees or licensees, on the stage of any theatre or place of public entertainment and amusement, the said novel entitled 'Ben Hur, a Tale of the Christ,' or any dramatization of the said novel, or any dramatic composition entitled 'Ben Hur,' or any of its scenes, incidents, plot or story, or any simulation, imitation or adapta-

tion of said book or dramatic composition, under the title of 'Ben Hur,' or otherwise."

It will be seen that this clause contained no such absurd and stultifying provision as is now proposed in the present motion by Manners.

Dated May 6, 1920.

Respectfully submitted,

CHARLES H. TUTTLE,
WILLIAM KLEIN,
Counsel for Oliver Morosco.

[4630]